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No. 99-3-743

IN THE

Supreme Court of the United States

JOHN duPONT,

Petitioner,

–against–

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617

COUNSEL OF RECORD

VICTORIA B. EIGER
Of Counsel

Attorney for Petitioner

ADDITIONAL COUNSEL ARE LISTED ON INSIDE COVER

79 pp

NATHAN Z. DERSHOWITZ
AMY ADELSON
Dershowitz, Eiger & Adelson, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667

NORRIS E. GELMAN, ESQ.
The Public Ledger Building
Suite 940
620 Chestnut Street
Philadelphia, PA 19106
(215) 574-0513

CHARLES A. PERUTO
Washington West Building
235 South 8th Street
Philadelphia, PA 19102
(215) 926-5800

VINCENT J. GROGAN
Grogan, Graffam, McGinley & Lucchino, P.C.
Three Gateway Center, 22nd Floor
Pittsburgh, PA 15222
(412) 553-6327

KATHRYN L. SIMPSON
Mette, Evans & Woodside
P.O. Box 5950
Harrisburg, PA 17110
(717) 232-5000

MICHAEL J. MALLOY
Law Offices of Michael J. Malloy
10 Veterans Square
Media, PA 19063
(610) 565-9145

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether Pennsylvania's statutory scheme, which uses overlapping tests for mutually exclusive verdicts – not guilty by reason of insanity and guilty but mentally ill – denied the petitioner due process of law, equal protection of the law, and subjected him to cruel and unusual punishment.

2. Whether Pennsylvania's abrogation of the no-propensity evidence rule in cases where the defendant presents an insanity defense violates due process.

3. Whether permitting a psychiatrist/lawyer who had been consulted by the defendant's attorney and who had secured confidential information from him to strategize and testify for the prosecution violated the attorney-client privilege and infringed upon the defendant's sixth amendment right to counsel.

4. Whether the confrontation clause permits the introduction of out-of-court statements by an available percipient witness, through an expert witness, on the ground that it is the type of information upon which experts reasonably rely, though it falls within no firmly rooted hearsay exception and contains no particularized guarantees of trustworthiness.

5. Whether due process is violated when a prosecutor argues that an inference against the defendant can be drawn from evidence not presented by the defense but available both sides, and the court instructs the jury that that inference is permissible.

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JURISDICTION OF THIS COURT

The decision of the Superior Court of Pennsylvania affirming the Petitioner's conviction and sentence was filed on April 20, 1999, and revised on April 26, 1999. A timely petition for allowance of appeal was filed in the Supreme Court of Pennsylvania on July 27, 1999, and was denied by order of the Supreme Court of Pennsylvania on January 13, 2000. Per order of Justice Souter, the time to petition for certiorari was extended to May 12, 2000.

This Court has jurisdiction to review the judgment of the Superior Court of Pennsylvania pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual

punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 Pa. C.S.A. § 314 and 18 Pa. C.S.A. § 315, which are lengthy, are set forth in the Statutory Appendix.

STATEMENT OF THE CASE

The jury in this case concluded by a preponderance of the evidence that Petitioner's mental illness caused him to kill David Schultz. Nevertheless, under Pennsylvania's unique statutory scheme for determining insanity, it convicted him of third degree murder.

John duPont demonstrated paranoid delusions well before he shot and killed Schultz, his friend and colleague. According to the Commonwealth's expert psychiatrist/lawyer, duPont's symptoms of mental disease did not constitute legal insanity. Under Pennsylvania law, where the defendant is "sick," the jury decides whether he is guilty (but mentally ill) or not guilty (by reason of insanity) by deciding whether or not he is "bad." Within this statutory framework, the prosecution was allowed to present constitutionally inadmissible evidence that Petitioner had engaged in bad acts, including ingestion of cocaine[1], though duPont could not dispute this evidence without creating a trial within a trial, and could not present evidence of good acts to

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[1] However, a hair sample indicated no presence of cocaine. (R. 1496a; R. 1840a) Moreover, there are causes other than cocaine that could have triggered duPont's condition, including the ingestion of certain medications.

weigh against the bad. Compounding the unfairness, Petitioner's alleged cocaine use was relied upon by the Commonwealth's expert as a basis for his conclusion. This conclusion was based upon highly confidential information received several years earlier from Petitioner's counsel, who had consulted with the expert seeking guidance about Petitioner's condition. The constitutional questions presented in this Petition arise out of this constellation of facts.

In the 1990's, according to the trial testimony, Petitioner exhibited symptoms of a serious mental disease which persisted until 1996. On the afternoon of January 26, 1996, duPont went to survey storm damage with Patrick Goodale, an employee of the company duPont had employed for security. duPont took his gun, a camera, and a bird book. Goodale, as usual, was armed. duPont drove around the farm, then headed to David Schultz's house. With Goodale watching, duPont shot Schultz three times, killing him. duPont then returned to his home. A two-day standoff with the police ensued.

Police tape recordings made during the standoff captured duPont's then existing disturbed and deluded mental state, with duPont proclaiming that "...this is holy property ... a forbidden city" and that "His Holiness is under siege." He identified himself as the American President, his holiness the Dalai Lama, and Jesus Christ. He repeatedly asked for the Bulgarian ambassador, and made numerous references to the existence of a state of war with Russia.

duPont's delusions were no secret. When interviewed by the police immediately after the shooting, Schultz's wife, who saw the third shot, described duPont this way:

> He's mentally insane. He hallucinates. He talks about things that he hears and sees. He thinks he's the Dalai Lama. But the last year he's been constantly under the impression that he is the

Dalai Lama and usually dresses in all red ... (R. 369aa, 369aaa)

After two days, duPont left his house, unarmed, to fix the heater, which the police had disabled. He was arrested and charged with the murder of David Schultz.

duPont was found incompetent to stand trial, but was adjudicated competent on December 9, 1996 after having been hospitalized and aggressively treated with anti-psychotic medication.[2] A jury trial commenced in January 1997 on the murder charge and a charge of simple assault on Goodale and Nancy Schultz. duPont's defense was insanity.

duPont's defense that he was insane at the time of the shooting was premised on both lay observations and examinations by forensic psychiatrists. Approximately six weeks after the shooting, defense psychiatrists conducted a videotaped interview with duPont. In that interview, duPont explained that Schultz was killed by duPont's "body double," that "they" were trying to get duPont by blaming him for the shooting, and that "they" were after Schultz and duPont because they were "co-Fuhrers."

At trial, the defense psychiatrists provided the jury with their expert opinions that duPont suffered from a severe mental illness – paranoid schizophrenia with both persecutory and grandiose delusions – that rendered him insane within the M'Naughten rule when he shot and killed David Schultz. One of them, Dr. Resnick, used an edited version of the videotaped interview to illustrate the points he was making.

Both the prosecution and defense agreed that during the three years prior to the shooting, duPont showed signs of being extraordinarily paranoid, fearing for his life. Among other

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[2] Petitioner continued to receive anti-psychotic medication until June, 1997.

things, he believed that there were mechanical trees on his property that extended their branches into his house, operated from a control room on the premises. Witnesses testified that during this period of time, duPont frequently acted on his delusions.[3]

There was also evidence that, in this period, duPont was plagued by delusions about his identity and role in the world similar to those expressed during the standoff.[4] He believed he held objects that gave him enormous power, including the Dalai Lama's ring, and the Shroud of Turin.

Witnesses testified that duPont's fears intensified in the Fall of 1995. Goodale was spending increasing time on the farm in the Fall of 1995. duPont became convinced that an October 1995 fire in the estate's greenhouse was an attempt on his life. A month later, he sustained a head injury as a result of a fall, and came to believe that it too was the result of an attempt to kill him. He even told some that he had been struck by a Russian soldier. In a November 24, 1995 interview with the police about that incident, duPont claimed to be the Dalai Lama, the Holy Child, the head of the Buddhist church of the world and the "supreme leader." He identified Dan Chaid, a wrestler who lived on his property and who was a close friend of Schultz, as a "player in a very secretive international conspiracy" and predicted that unless an arrest for the assault on him was made

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[3] As duPont's paranoia increased, the security firm that had previously been employed by duPont but dismissed in 1993 fueled his paranoia in order to be rehired. They exploited the paranoia by giving it a basis in reality and encouraging extreme and costly security measures. Earlier Goodale's firm had reported to duPont that they had become aware of a threat on duPont's life. As a result they employed extreme protective measures on his behalf as well as surveillance of the purported perpetrator.

[4] During the standoff duPont identified himself as the Dalai Lama and Jesus Christ, two holy men. Contrast this with his identification as a co-Fuhrer, arguably the most evil of men. Thus he claimed to be both the holiest and most evil of men at the same time.

soon, "the entire Russian army would be in Newtown Township [the location of his home] fighting the ultimate war."

In January 1996, according to the witnesses, duPont displayed continuing paranoia. Following the January 1996 blizzard, he instructed his employees that a road on the farm not be plowed so that he could see the footprints of anyone trying to get him. He then directed that snow be piled in front of that road to form a protective barrier. Later that month, duPont stopped a contractor working at his house and told him "somebody is trying to kill me." Then three days before the shooting, in separate conversations, he told two others that the "threat" was on the farm. The afternoon before the shooting, duPont told another individual that his life was in jeopardy.

Nevertheless, the Commonwealth's two psychiatrists evaluated duPont and concluded that, while he suffered from a severe and longstanding mental illness, he did not come within the M'Naughten definition of insanity. Both testified that duPont was not legally insane when he shot Schultz.

One of the prosecution experts was Dr. John O'Brien, a psychiatrist and a lawyer, who ascribed duPont's conduct to a psychotic disorder with delusions, induced by cocaine. Dr. O'Brien's participation in the case was vigorously opposed by the defense.

In December 1992, Dr. O'Brien was consulted by Taras Wochok, duPont's personal attorney. Wochok, pursuant to his ethical obligations, sought the advice of a psychiatrist about duPont's deteriorating mental health and its legal implications, including civil commitment. That psychiatrist set up a meeting with Wochok and two other psychiatrists, one of whom – O'Brien – was invited precisely because he was a lawyer as well as a forensic psychiatrist. The meeting lasted for several hours, during which time Wochok described in detail highly confidential information regarding duPont's erratic behavior. During the meeting, in answer to O'Brien's probing, Wochok

related rumors about duPont's suspected cocaine use.[5] O'Brien submitted an invoice for his professional services and was paid.

During the pre-trial stages, the trial court selected O'Brien as one of the court's competency experts. Counsel for duPont objected to this selection based on the earlier consultation, and the court replaced O'Brien with another psychiatrist. The Commonwealth, nevertheless, knowing of O'Brien's conflict, retained him to develop prosecution strategy and to testify. The defense twice sought, unsuccessfully, to disqualify O'Brien on conflict and confidentiality grounds, arguing that "Wochok in good faith communicated certain matters to Dr. O'Brien he learned as a result of his professional relationship with John duPont and fully expected that none of this information would later be used by Dr. O'Brien (in any way) against John duPont." (R. 2014a-2015a)[6] See App. 5-11; R. 2012a-2026a (motion to disqualify).

At trial, Dr. O'Brien, and Dr. Park Dietz, the Commonwealth's other expert, were permitted to testify about a transcribed statement given by Georgia Dusckas, a longtime employee of duPont's. Ms. Dusckas was available to testify, but

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[5] The other psychiatrist, Dr. Howard Sudak, prepared a summary of the meeting on behalf of himself and O'Brien, specifically recounting Wochok's confidential discussion of duPont's possible substance abuse, and O'Brien's opinion about duPont's mental condition, its possible causes, his need for psychiatric attention, and his conclusion that he was not a candidate for civil commitment.

[6] On appeal to the Superior Court, Petitioner relied, expressly, on the attorney-client privilege (Definitive Brief of Appellant at 23, 25-29), which, as argued infra, enjoys constitutional protection in criminal cases. The Superior Court rejected the claim on the grounds discussed infra at 23-24. Petitioner sought to present the constitutional issue to the Pennsylvania Supreme Court urging that review be granted on the ground, inter alia, that the Superior Court's decision "permits an infringement of a defendant's Fifth, Sixth, and Fourteenth Amendment rights to due process, to counsel, and to a fair trial ...." (Petition for Allowance of Appeal at 18)

was not called by the prosecution. Instead, through Dr. O'Brien, portions of Dusckas's out-of-court statement, including her perceptions about duPont's temper, his delusional statements, his relationship with Schultz, and his actions upon returning to the house following the shooting, were read to the jury. Through Dr. Dietz, other parts of the Dusckas statement referring to a perspiration soaked t-shirt discarded after the shooting, the absence of expressed delusional statements on the day of the incident, and the timing of events on the day of the shooting, were introduced. Neither expert relied on Dusckas's statement in forming his opinion, though Dr. O'Brien explained that Dusckas' statement supported an opinion he had already reached and rendered, and supported his trial testimony.[7]

Over defense objections, the trial court also permitted the Commonwealth to introduce highly prejudicial evidence about duPont's alleged prior bad acts, including vague evidence of duPont's alleged drug abuse, his dismissal of African-American wrestlers from the wrestling team, and of an alleged hit and run

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[7] The defense objected on hearsay grounds but the objection was overruled. (R. 1551a-1555a) On appeal to the Superior Court, duPont argued that inadmissible hearsay was received, and that the Confrontation Clause was violated. (Definitive Brief of Appellant at 50-56) The Superior Court ruled that the Confrontation Clause was not violated. "The fact that experts reasonably and regularly rely on [out-of-court] information merely to practice their profession lends strong indicia of reliability to source material, when it is presented through a qualified expert's eyes." (App. 22) Petitioner submits that this ruling did not address his confrontation claim. Petitioner conceded that an expert may rely on the statements of others in formulating his or her opinion. But such reliance does not allow the expert to read the statements of others to the jury as substantive proof. In other words, the hearsay statements of others must be filtered through the lens used by the expert in formulating his expert opinion, and only his expert opinion is substantive evidence. An expert cannot convert pure hearsay into substantive proof merely because as an expert he relies on such hearsay "to practice [his] profession." The expert is called for his or her opinion - not to act as a conduit for hearsay - and when the expert becomes such a conduit, the Confrontation Clause is violated.

accident that took place eight years before the shooting, and well before the symptoms of duPont's mental illness appeared.[8]

Further, despite an objection by the defense, the prosecutor was allowed to argue to the jury that the portions of the videotaped interview of the defendant that were not shown to the jury (but were available for showing by the prosecution) were less favorable to the defendant than the portions that were shown. The trial judge, over objection, charged the jury that such an inference was permissible.[9]

The jury was also instructed that, because duPont had raised the defense of insanity, it would have to consider two "special verdicts" – guilty but mentally ill and not guilty by reason of insanity – in addition to the "ordinary" verdicts of guilty and not guilty. The court told the jurors that it might help them to understand the instructions on the special verdicts to keep in mind why these verdicts exist:

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[8] Evidence about the 1987 car accident was objected to on the ground that it was "irrelevant" because it predated the onset of duPont's mental illness (R. 1178a), and on the grounds that its "prejudicial value is clearly outweighed by what ever probative value it may be" and that it would "confuse the issues." Testimony about wrongful termination was objected to. (R. 1712a-1714a) A motion to strike was overruled. (R. 1714a) The defense repeatedly objected to the introduction of evidence about duPont's alleged drug use, (R. 1150a), and moved to strike all of the drug evidence that was admitted. (R. 1193a-1194a; 1385a-1386a; 2029a-2930a (post-trial motions)) While the Commonwealth argued on appeal that not all of the bad act evidence was objected to, the Superior Court addressed, on the merits, all of the Petitioner's bad act claims and rejected them. (App. 16-19)

[9] See R.1945a (sidebar objection to prosecutor's telling the jury "what they didn't see" and asking court "to tell the jury they are not to consider ... evidence ... they didn't see"). The Superior Court rejected the Commonwealth's claim that the issue was not preserved for review, and addressed it on the merits. (App. 23-25)

> The verdict of not guilty by reason of legal insanity labels a defendant as sick rather than bad .... The verdict of guilty but mentally ill labels a defendant as both bad and sick.

(R. 1981a)[10]

Following seven days of deliberations, the jury found Petitioner guilty but mentally ill of murder and simple assault. Notwithstanding the jury's finding that duPont's acts were the product of his mental illness, the judge did not consider his illness as a mitigating factor for sentencing purposes. Indeed, she treated it as an aggravating factor, and sentenced Petitioner to a term of 13 to 30 years -- one tantamount to a life sentence -- for "the purpose of assuring that as long as [duPont] lives his mental illness can never again be ignored." (R. 2010a)

On appeal to the Superior Court of Pennsylvania, the judgment was affirmed.

Petitioner sought review in the Pennsylvania Supreme Court, seeking review on each of the federal constitutional claims raised here, but review was denied.

As the record shows, John duPont was a good and charitable man until he fell victim to a disease that the jury found caused him to kill a good friend. In the legal proceedings that followed the killing, he was then victimized by one of his own psychiatrists, by an application of the rules of evidence that let the jury hear about his claimed bad acts (but not his good ones), by a prosecutor who misled the jury in summation, by a jury charge that approved of the prosecutor's misleading argument,

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[10] Petitioner challenged the constitutionality of the guilty but mentally ill statute in post-trial motions. See Decision of the Trial Court dated 6/29/98 at 51-56. The Superior Court rejected the constitutional challenge, holding that the statute's constitutionality had already been upheld. See App. 11-16.

and by a peculiar statutory scheme that allowed a verdict of guilty but mentally ill that uses a standard test of legal insanity as a basis for a guilty verdict and that asked the jury to decide between conviction and acquittal depending on whether he was "sick and bad" or "sick, not bad." Because Petitioner's case raises constitutional questions of the utmost importance, he respectfully prays that the writ of certiorari be granted.

REASONS FOR GRANTING THE WRIT

I. AS APPLIED IN THIS CASE, PENNSYLVANIA'S STATUTORY SCHEME, WHICH USES OVERLAPPING TESTS FOR MUTUALLY EXCLUSIVE VERDICTS – NOT GUILTY BY REASON OF INSANITY AND GUILTY BUT MENTALLY ILL – DENIED THE PETITIONER DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, AND SUBJECTED HIM TO CRUEL AND UNUSUAL PUNISHMENT

In recent years, a number of states, dissatisfied with the criminal justice system's limited options for dealing with mentally disturbed defendants, have enacted statutes creating a category or verdict of "guilty but mentally ill" to supplement the traditional categories of guilty, not guilty, and not guilty by reason of insanity.[11] Pennsylvania is among the jurisdictions that have enacted such legislation, but its treatment of the subject is unique. In legislation enacted in 1982, Pennsylvania created a verdict of "guilty but mentally ill" to be considered by the fact finder in any case where the defendant offers a defense of

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[11] Michigan was the first state to enact a GBMI plea and verdict, in 1975. See Mich. Comp. Laws. Ann. § 768.36 (West 1982). Eleven other states have followed. See Alaska Stat. § 12.47.030; Del. Code Ann., tit. xi, § 401; Ga. Code Ann. § 17-7-131; 720 Ill. Comp. Stat. 5/6-2; Ind. Code Ann. §§ 35-35-1-1 to -4; Ky. Rev. Stat. Ann. § 504.130; Nev. Rev. Stat. § 174.035; N.M. Stat. Ann. § 31-9-3; S.C. Code Ann. § 17-24-20; S.D. Codified Laws § 23A-25-13; Utah Code Ann. § 77-13-1, 77-16a-102.

insanity. But, instead of defining mental illness as something other than legal insanity, Pennsylvania utilized the Model Penal Code's test of legal insanity as its test of mental illness. Although the Model Penal Code test was explicitly designed to exculpate, Pennsylvania uses it to incriminate.

Thus, under Pennsylvania law, a defendant is to be found guilty but mentally ill if the jury finds, by a preponderance of the evidence, that:

> As a result of mental illness, [he] lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

18 Pa. C.S.A. § 314(c)(1). The defendant is to be found legally insane, and not guilty, if he satisfies the M'Naughten test, that is, if he proves, by a preponderance of the evidence, that, at the time of the commission of the offense, he:

> was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if [he] did know the quality of the act, that he did not know what he was doing was wrong.

18 Pa. C.S.A. § 315(b).

The two verdicts – not guilty by reason of insanity and guilty but mentally ill – are mutually exclusive, and have vastly different consequences.[12] But the two legal tests are not. The Model Penal Code's test is broader because, by virtue of its

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[12] The NGRI defendant is released from the constraints of the criminal justice system. The GBMI defendant is sentenced like any other "guilty" defendant. Whether he receives treatment for his mental illness depends on a Department of Corrections diagnosis, not on the jury's (or the court's) determination.

second prong, it reaches persons who cannot conform their conduct to the law, which was not the issue in this prosecution. But the Model Penal Code's first prong – "lacked substantial capacity ... to appreciate the wrongfulness of his conduct" is not appreciably different from the M'Naughten test of legal insanity. A person who is legally insane under M'Naughten is necessarily "mentally ill" under the Model Penal Code standard. Equally important, any person who is mentally ill under the first prong of the Model Penal Code standard would appear to satisfy the M'Naughten test.

Though the prosecution insisted that there is a difference in M'Naughten's use of the word "know" and the Model Penal Code's use of the word "appreciate,"[13] it is a distinction the Pennsylvania courts have utterly failed to notice. In fact, their decisions use the terms "know" and "appreciate" interchangeably in discussing legal insanity. See, e.g., Commonwealth v. Belmonte, 502 A.2d 1241, 1245 (Pa. Super. 1985), overruled on other grounds, 539 A.2d 1317 (Pa. Super. 1988)(accused is legally insane only if .... he either did not appreciate the nature and quality of his act or did not know that it was wrong" (emphasis added); Commonwealth v. Sheppard, 648 A.2d 563, 569 (Pa. Super. 1994) ("if appellant was so paranoid that he did not know the nature or quality of the act he was committing ... then guilty but mentally ill was the proper defense") (emphasis added).

The Commonwealth's arguments to the contrary, there is no principled way to assign the defendant who satisfies both tests to one category rather than the other. A jury permitted to choose between the two alternatives is deciding a defendant's fate by the flip of a coin.[14] That is constitutionally impermissible.

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[13] The Commonwealth argued that "appreciate" conveys a "broader sense of understanding than simple cognition." Commonwealth's Brief at 39.

[14] If the prosecution were obligated to prove beyond a reasonable doubt that the defendant is not legally insane before it could return a verdict

The insanity defense has a long history as part of the jurisprudence of both England and America. American law has long rested on the assumption that criminal sanctions should not be imposed on those who are mentally incapable of understanding their actions. This Court has held that States are not constitutionally required to adopt a particular insanity defense, but has not yet addressed the issue of whether the defense itself is required. See Foucha v. Louisiana, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring); Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Rehnquist, J., dissenting); Leland v. Oregon, 343 U.S. 790 (1952).[15] Whether or not the insanity defense is constitutionally mandated, a state's system of dealing with mentally disturbed defendants must comport with the Constitution, including the requirements of due process and equal protection.

Pennsylvania's system does not. The undeniable overlap of the two legal standards gives rise to an unacceptably high risk that a legally insane person will be adjudicated mentally ill but guilty, which itself constitutes a violation of the due process, equal protection, and cruel and unusual punishment clauses.

This constitutional problem is exacerbated by Pennsylvania's judicially approved standard jury instruction, explaining that the two verdicts distinguish between persons who are "sick rather than bad" and those who are "both bad and sick."

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of guilty but mentally ill, the problem would be mitigated. Although 18 Pa. C.S.A. § 314(a) appears, on its face, to require that the Commonwealth carry that burden before a GBMI verdict may be returned, the Pennsylvania courts have ruled that the Commonwealth does not have such a burden. See Commonwealth v. Sohmer, 519 Pa. 200, 546 A.2d 601 (1988).

[15] Several state courts have found the insanity defense constitutionally required by the due process clause, the right to a trial by jury, and the prohibition against cruel and unusual punishment. See State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910); State ex rel. Boyd v. Green, 355 So. 2d 789 (Fla. 1978); Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931).

The instruction encourages the jury to evade the task of assessing the nature and effect of the defendant's mental disturbance and invites the jury to focus instead on whether or not the defendant was "bad" or "not bad." After all, under the jury charge, if the jurors agreed that the defendant was sick – which they did in Petitioner's case when they found him mentally ill – then that factor fell out of the equation entirely.

No extended citation of authority is necessary to establish that the United States Constitution does not permit a criminal verdict to be based on jurors' assessments of whether or not the defendant is "bad." See infra Point II. "Bad" is a moral or ethical judgment, not a legal standard, and it is irrelevant to assessing a defendant's mental state. Moreover, a defendant cannot, consistent with due process, be asked to prove that he is "not bad," as Petitioner was required to do by the Pennsylvania insanity statutes. A defendant who has killed an innocent victim could never prove that.

The states' freedom to engage in experimentation is constrained by the Constitution. No matter how well intentioned, the Pennsylvania scheme, as construed and applied by the courts of Pennsylvania, offends the Due Process Clause's guarantee of fundamental fairness in state trials. See Spencer v. Texas, 385 U.S. 554, 563 (1967); Tumey v. Ohio, 273 U.S. 510 (1927). The state court's decision to the contrary constitutes an "unreasonable application" of federal law. See Williams v. Taylor, __ U.S. __, 120 S.Ct. 1495 (2000). This Court should grant certiorari and strike down the Pennsylvania statutory scheme, as applied.

II. PENNSYLVANIA'S ABROGATION OF THE NO-PROPENSITY EVIDENCE RULE IN CASES WHERE THE DEFENDANT PRESENTS AN INSANITY DEFENSE VIOLATES DUE PROCESS

For all intents and purposes, Pennsylvania has abrogated the rule proscribing propensity evidence in cases where the defendant has raised an insanity defense. It has done this not in one fell swoop, but in two. First, the Superior Court ruled that, because duPont defended on the ground of insanity, his prior bad acts were admissible because they went to his mental state, the central issue in the case. Second, the court once again approved a Pennsylvania standard jury charge stating that, in deciding between the verdicts of not guilty by reason of insanity and guilty but mentally ill, the jury's task was to determine whether the defendant was "sick rather than bad" or "both bad and sick." (App. 15-16)

By approving the admission of bad act evidence on the issue of defendant's mental state, and then instructing the jury that, if duPont was "sick," his guilt or innocence turned on whether he was "bad" or "not bad," the court insured that the jury would use the bad act evidence it had heard to decide whether or not duPont was "bad," that is, to assess his character. Because the Constitution's guarantee of due process does not allow a defendant to be convicted of a crime based on evidence of his bad character or propensity, certiorari should be granted.

The use of bad acts evidence as evidence of character is contrary to firmly established principles of Anglo-American jurisprudence. See McKinney v. Rees, 993 F.2d 1378, 1380 (9th Cir. 1993) (discussing the English and early American cases). See also Boyd v. United States, 142 U.S. 450 (1892) (admission of evidence of defendant's other crimes prejudiced the defendant and required reversal of convictions); Michelson v. United States, 335 U.S. 469, 475 (1948) (the right to a fair trial "disallow[s] resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his

guilt"); Brinegar v. United States, 338 U.S. 160, 174 (1949); Old Chief v. United States, 117 S.Ct. 644 (1997). "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." Michelson v. United States, supra, 335 U.S. at 475:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Id. at 476 (footnote omitted). In a nutshell,

> [C]haracter evidence ... tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what evidence in the case shows actually happened.

Advisory Committee's Note to Fed. R. Evid. 404(b).

Nevertheless, defendant's bad acts may be relevant to a matter in issue and, where that is so, the propensity rule will not operate to exclude them. See McCormick's Handbook of the Law of Evidence, § 190 at 557-65 (3d ed. 1984); Fed. R. Evid. 404(b) (evidence of other crimes, wrongs or acts may be admissible as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident ..."). Even when relevant to another issue in the case, because bad act

evidence carries the potential for misuse by the jury and prejudice to the defendant, courts will exclude it if its probative value is outweighed by its potential for unfair prejudice. See Lesko v. Owens, 881 F.2d 44, 51-52 (3d Cir. 1989) (admission of evidence that is relevant but excessively inflammatory might rise to the level of a constitutional violation); McCormick's Handbook of the Law of Evidence, supra ("[E]ven if one or more of the valid purposes for admitting other crimes evidence is appropriately invoked, there is still the need to balance its probative value against the usual counterweights").

These rules are grounded in the Constitutional guarantee of due process, which safeguards the fundamental elements of fairness in criminal trials. See Spencer v. Texas, 385 U.S. 554, 563-64 (1967); Tumey v. Ohio, 273 U.S. 510 (1927); Palko v. Connecticut, 302 U.S. 319 (1937) (due process protects fundamental interests that are "implicit in the concept of ordered liberty"). While not all rules of evidence are constitutionally mandated, those essential to a fair trial are:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

Brinegar v. United States, supra, 338 U.S. at 174. Accordingly, as several courts have found, evidence of a defendant's bad acts, introduced for no purpose other than to show criminal disposition, violates the due process clause. See, e.g., McKinney v. Rees, supra, 993 F.2d at 1384-86; Lovely v. United States, 169 F.2d 386, 389 (4th Cir. 1948); Railton v. United States, 127 F.2d 691, 693 (5th Cir. 1942). See also Estelle v. McGuire, 502

U.S. 62, 75 n.5 (1991) (reserving decision on whether introducing evidence to establish propensity violates due process).

In Petitioner's case, a great deal of bad act evidence was introduced against him, over his objection, including testimony of others about his alleged drug use, his arguably racist acts, and his alleged involvement in an accident that took place eight years before the shooting – testimony to which Petitioner could not effectively respond.

To be sure, this evidence was not admitted as evidence of propensity: it was admitted, and its admission upheld on appeal, on the ground that it was relevant to defendant's mental condition and on the question of his sanity. According to the Superior Court, "evidence of any behavior during [the] time period which reflected duPont's mental state, including substance abuse was clearly relevant." (App. 18) Similarly, with respect to the alleged accident, the court said it was "probative as part of the natural history of this case, particularly [duPont's] history of mental illness." The Court's belief that a defendant's bad acts are always relevant when his legal sanity is at issue appears to be based upon a misreading of Wigmore.[16] Be that as it may, a rule making evidence of the defendant's prior bad acts relevant and admissible merely because insanity is pled would itself raise serious questions of due process. It would burden the right to present an insanity defense, and would operate effectively to disqualify those with criminal or bad histories from raising the issue of insanity.

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[16] Wigmore's chief concern was that defendants not be precluded from introducing evidence of conduct that would reflect on their state of mind and that would aid them in presenting an insanity defense. He does not address the prosecution's introduction of prior bad acts or the prejudice that may arise when such evidence is admitted without careful analysis of how it is relevant to the particular defendant's state of mind. See 2 Wigmore on Evidence § 228, at 11 (Chadbourn rev. 1979).

Certainly, when such an evidentiary rule is combined with a charge that instructs the jury to assess whether the defendant is not guilty by reason of insanity or guilty but mentally ill by determining whether he is bad or not, due process is denied. With that jury instruction, the defendant does not merely run the risk, but faces the virtual certainty, that the jury will betray its obligation to make its determination of guilt or innocence solely with reference to whether he committed the charged criminal act with the requisite mental state. The jury is charged that it is its obligation to determine whether or not the defendant is "bad." Under this instruction, the jury is not only permitted, but directed, to rely on bad act evidence for the very reason such evidence has historically been excluded – to determine whether the defendant is "bad." In the words of Estelle v. McGuire, 502 U.S. 62, 74-75 (1991), there is more than "a 'reasonable likelihood' that the jury would have concluded that this instruction, read in the context of other instructions, authorized the use of propensity evidence pure and simple." Accordingly, the state court's decision is "contrary to" and an "unreasonable application" of federal law. See Williams v. Taylor, supra, 120 S.Ct.at 1499. Both because Pennsylvania has abrogated the rule against propensity evidence in cases where an insanity defense is presented and because defendants who defend on the ground of insanity are arguably the defendants who most need the protection of the rule, certiorari should be granted.

III. PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN A PSYCHIATRIST/LAWYER CONSULTED BY PETITIONER'S COUNSEL AND PROVIDED WITH CONFIDENTIAL INFORMATION WAS PERMITTED TO STRATEGIZE FOR THE PROSECUTION AND TESTIFY AS THE PROSECUTION'S EXPERT

Both the defense and prosecution experts testified that Petitioner suffered from a serious mental illness which made him paranoid and mistrustful of those who claimed to be on his side.

Ironically, at his own trial, one of the psychiatrists who had been hired by his own lawyer to provide guidance about Petitioner's condition, became an expert and strategist for the prosecution. This Court should grant review and rule that this violation of his attorney-client privilege constituted a violation of Petitioner's constitutional right to the effective assistance of counsel, and deprived him of a fair trial.

While the attorney-client privilege and the Sixth Amendment right to counsel are not the same, a communication between an attorney and his client that is protected by the common law attorney-client privilege is also protected from government intrusion by the Sixth Amendment. United States v. Blasco, 702 F.2d 1315, 1329 (11th Cir.), cert. denied, 464 U.S. 914 (1983); United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981); United States v. Noriega, 917 F.2d 1543, 1551 n. 9 (11th Cir. 1990). See also McCormick's Handbook of the Law of Evidence, § 91 (Edward W. Cleary 2d ed. 1972).[17] The right to counsel would be of little value without the protection of free and open communications between a client and his attorney. See United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978).

Of course, the common law attorney-client privilege, "the oldest of privileges for confidential communications known to the common law," Upjohn Co. v. United States, 449 U.S. 383 (1981), protects more than communications from the client to his attorney. It also protects communications from an attorney to his client, and confidential communications between an attorney and the attorney's agents made for the purpose of providing legal advice and services to the client. See United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (attorney-client

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[17] Privileges, like the privilege against self-incrimination which are constitutionally based, are different from statutory or common law privileges that have no constitutional basis. See Maness v. Meyers, 419 U.S. 449, 461 n.8 (1975). The privilege arising from the relationship of lawyer and client, in criminal cases, is rooted in the Constitution's guarantee of effective assistance of counsel.

privilege covers communications made to certain agents of an attorney; "As to such agents, what is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."); United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). Accordingly, communications by a lawyer to a psychiatrist for the purpose of obtaining advice are protected by the attorney-client privilege. United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975).

When a defendant's confidential conversations with his counsel have been overheard, this Court's rulings strongly suggest that "the constitutionality of the conviction depends on whether the overheard conversations with counsel have produced, directly or indirectly, any of the evidence offered at trial." Weatherford v. Bursey, 429 U.S. 545, 552 (1977), explaining Black v. United States, 385 U.S. 26 (1966) (per curiam), and O'Brien v. United States, 386 U.S. 345 (1967) (per curiam).

The constitutionality of duPont's conviction therefore rests on whether information imparted confidentially to Dr. O'Brien produced, "directly or indirectly, any of the evidence offered" against duPont at his trial.[18] It seems clear, from the record, that it did. Notwithstanding the availability of numerous psychiatric experts, the Commonwealth chose to use a psychiatrist who had had a prior relationship to the Petitioner. In the course of that relationship, Petitioner's lawyer had entrusted confidential information to the psychiatrist, including information that duPont may have abused drugs. At trial, as the

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[18] This is not a case where the defendant somehow "assumed the risk" that the psychiatrist his lawyer had consulted on his behalf would switch sides. Such a psychiatrist, like the lawyer for whom he worked, is not permitted to switch sides. See generally, "Disqualification of Prosecuting Attorney in State Criminal Case on Account of Relationship with Accused," 42 A.L.R. 5th 581 (1996); Annot., Disqualification of Law Firm From Representing Party in Federal Civil Suit Involving Former Client of that Firm, 56 A.L.R. Fed. 189 (1982).

Commonwealth's expert, Dr. O'Brien testified that duPont's mental illness was caused by drug abuse, and that he was not legally insane.

The Pennsylvania Superior Court rejected Petitioner's claims regarding Dr. O'Brien. The court opined that Wochok's 1992 conversation with O'Brien was "completely unrelated to any provision of legal services," and that there was nothing "to establish any attorney-client relationship between defense counsel and Dr. O'Brien with respect to the present case." (App. 10)

The court's view that Wochok's consultation was "unrelated" to the "provision of legal services" is wholly at odds with the record and with reality. Wochok, duPont's personal attorney, consulted three psychiatrists, including O'Brien, not because he wanted to speak with them about duPont for his own sake, but because, as duPont's attorney, he had concerns about whether duPont could be involuntarily committed. He needed professional advice to determine what legal advice he should render. As an attorney representing a client suffering from a disability, he had an ethical responsibility "to seek guidance from an appropriate diagnostician." Pa. Rules of Professional Conduct, Rule 1.14 cmt. The notion that the consultation was unrelated to the provision of legal services is not supported by the record or by common sense.[19]

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[19] The court also ruled that the record failed to establish that Dr. O'Brien received, retained, or used any information from the December 1992 conference. This is belied by both the record and the court's own acknowledgment that O'Brien recalled hearing at that meeting "that duPont probably used cocaine." (App. 7) (R. 1342) And, while O'Brien might have considered possible drug use in formulating his opinion even had the 1992 meeting not occurred, there is no basis to believe he would have reached the same conclusion as he did without having attended the 1992 meeting. The trial testimony about Petitioner's drug use was anecdotal testimony from witnesses who observed duPont with white powder on his nose and acting "hyper." It was precisely because O'Brien had already secured similar information from Wochok during their consultation that he could credit these

The court's alternative theory – that there was no attorney-client privilege because O'Brien was not consulted in connection with the criminal case at hand – is equally invalid. The attorney-client privilege, arising as it does from the need to protect the free flow of information between client and attorney, is not "case-specific."[20] The privilege – as well as the Sixth Amendment – was violated when the confidential communication that was disclosed was used against the defendant in a criminal prosecution, whether or not criminal charges were pending when the confidential communication occurred.[21]

By refusing to recognize that the attorney-client privilege protected confidential communications between Petitioner's attorney and a psychiatrist/lawyer he had consulted and paid to assist him in providing legal services to the Petitioner, the Pennsylvania courts unreasonably applied federal law and countenanced a significant infringement of the Sixth Amendment right to effective assistance of counsel, as guaranteed by the Fourteenth Amendment.

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observations. Accordingly, the finding of the court below is demonstrably wrong.

[20] See United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir. 1989)(actual litigation in progress is not necessary for the attorney client privilege to apply); Witnesses, 81 Am. Jur. 2d § 371, at 339 (As long as the subject matter of the consultation is such that it may become the subject of judicial inquiry, or concern legal rights and obligations of the client, the privileged communication rule generally protects against disclosure of facts revealed in nonlitigious as well as litigious consultations).

[21] Prosecutors make this point regularly when they seek disqualification of defense attorneys based on prior representation of witnesses or co-defendants in other matters both civil and criminal. See, e.g., United States v. O'Malley, 786 F.2d 786, 790 (7th Cir. 1986).

IV. THE CONFRONTATION CLAUSE DOES NOT PERMIT THE INTRODUCTION OF HEARSAY THROUGH AN EXPERT WITNESS, EVEN IF IT IS THE TYPE OF INFORMATION UPON WHICH EXPERTS REASONABLY RELY, UNLESS IT FALLS WITHIN A FIRMLY ROOTED HEARSAY EXCEPTION OR CONTAINS PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS

This case presents the question whether the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, permits the introduction of hearsay statements through an expert witness on a bare finding that the hearsay is the type of information reasonably relied upon by experts in the field. The Pennsylvania courts have determined that, if the information is of a kind generally relied on by experts, the expert may not only rely upon it but may also put hearsay statements before the jury in explaining the basis for his opinion. Rejecting the Sixth Amendment claim presented by Petitioner, the Superior Court, quoting Primavera v. Celotex Corp., 608 A.2d 515 (Pa. Super. 1992), appeal denied, 533 Pa. 641, 622 A.2d 1374 (1993), said:

> The fact that experts reasonably and regularly rely on [out of court] information merely to practice their profession lends strong indicia of reliability to source material, when it is presented through an expert's eyes.

(App. 22)

Petitioner submits that, at least in criminal cases, where the defendant's right to confrontation is subject to constitutional safeguards, more is required. Under the Confrontation Clause, hearsay evidence may not be introduced, even if introduced through an expert witness, where the declarant is not subject to cross-examination, except where the hearsay falls within a firmly rooted hearsay exception or carries particularized guarantees of

trustworthiness. Lilly v. Virginia, 119 S. Ct. 1887, 1894 (1999). Applying Lilly's mandate to expert testimony will not result in a massive change in how expert testimony is handled. In many, perhaps most, cases, the information upon which experts rely does fall within a firmly rooted hearsay exception and/or does bear particularized guarantees of trustworthiness. Thus, for example, where a physician reaches a conclusion based, in part, upon reports of other physicians or experts, or data collected by them, no Confrontation Clause problems will arise.

But, as this case shows, an expert's reliance – even all experts' reliance – on particular kinds of information does not in itself make such information so trustworthy that the concerns of the Confrontation Clause are automatically met. That is especially true in the field of psychiatry where, because of the very nature of the psychiatrist's calling, the psychiatrist may look to a wide range of information, from a number of non-expert sources, in reaching an opinion as to the subject's mental condition. Where the patient's sanity is at issue, he himself is necessarily a "biased" reporter and, as a result of the illness itself, may be incapable of giving accurate or reliable information. Of necessity, and to acquire a broader view, a psychiatrist may look to others who have known or observed the patient to shed light on an individual by providing historical or background data or describing the patient's conduct or demeanor. But, clearly, a practice in the profession as a whole to rely on information provided by third parties – or by a particular psychiatrist to rely on information from a particular third party "informant" to reach an opinion or to confirm an opinion already reached – cannot itself render the informant's out-of-court statements reliable for confrontation purposes. The Constitution does not delegate to any profession – or to any practitioner – the power to determine what hearsay evidence will be received at criminal trials.

In light of this Court's recent decision in Lilly, the introduction of hearsay statements of a percipient witness, through an expert, violates the defendant's right to confrontation,

and is "contrary to" or "an unreasonable application of" clearly established federal law. It raises an important issue of constitutional law which this Court should address.

V. PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE PROSECUTOR WAS PERMITTED TO ARGUE THAT THE JURY COULD DRAW AN INFERENCE AGAINST THE DEFENDANT FROM EVIDENCE THAT WAS NOT PRESENTED BUT WAS AVAILABLE TO BOTH PARTIES AND WHERE THE TRIAL COURT INSTRUCTED THE JURY THAT THAT INFERENCE WAS PERMISSIBLE

Six weeks after the shooting, the defense's expert psychiatrists interviewed the defendant at length. The entire interview was videotaped and the tape provided to the prosecution. Defense expert Dr. Resnick testified that he had edited the lengthy videotape to illustrate the main points he would be making. During his direct examination, the edited tape was played.

The prosecution had the complete, unedited videotape but chose not to show any other part of the videotaped interview at any time. But, in closing, over objection, the prosecutor argued that the reason the defense had not played the entire tape for the jury was that portions of it were unfavorable to the defense. In fact, as argued below, a review of the record shows that the prosecutor misled the jury: the portions that were edited out were not less favorable to the Petitioner than the portions that were shown.

Nevertheless, again over objection, the court instructed the jury that it was free to accept the inference the prosecutor had urged: that the portions of the videotape that were edited out

were less favorable to the defendant than the portions that were shown.

Both the prosecutor's argument to the jury and the court's charge, which were upheld on appeal over claims that they violated both state law and the due process clause, constituted error of constitutional dimension.

With one exception, jurors may draw inferences only from evidence that is before them. The exception is one most frequently associated with the "missing witness" charge, but the principle of law is slightly broader.

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.

Wigmore, Evidence, § 285, at 192 (Chadbourne rev. 1979). However, as Wigmore points out, "These inferences ... cannot fairly be made except upon certain conditions." Id.

One circumstance that negates the inference of the non-calling party's fear of adverse evidence is the availability of the evidence to the other party. [22] Where the evidence is available to both sides, the negative inference is not a rational one; allowing a jury to draw such an inference is a violation of due process. See Barnes v. United States, 412 U.S. 837, 842 (1973) ("an

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[22] The Pennsylvania decisions recognize these principles, but the court below held that they apply only in the case of missing witnesses, not other missing evidence. (App. 25) There is no rational basis for drawing such a distinction.

inference is 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend"). The inference urged by the prosecutor and permitted by the court also deprived the defendant of the "right to be tried solely on the evidence presented to the jury."[23] See United States v. Young, 470 U.S. 1, 18 (1985) (plain error where prosecutor's comments conveyed impression that evidence not presented to the jury, but known to the prosecutor, supported the charges against the defendant). The decision below is contrary to and an unreasonable application of federal due process law.

The argument and jury charge approved in this case transform trials into contests, not about what the admitted evidence shows, but about what evidence never offered might be thought to suggest. Certiorari should be granted to determine whether that is permissible under the due process clause.

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[23] Moreover, in criminal cases, the inference can operate to shift the burden of proof to the defendant, itself a violation of due process. See Sandstrom v. Montana, 442 U.S. 510, 524 (1979).

CONCLUSION

For the reasons stated, Petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617

COUNSEL OF RECORD

VICTORIA B. EIGER
Of Counsel

Attorney for Petitioner

APPENDIX

730 A.2d 970
(Cite as: 730 A.2d 970)

COMMONWEALTH of Pennsylvania, Appellee,
v.
John E. duPONT, Appellant.

Superior Court of Pennsylvania.

Argued March 9, 1999.

Filed April 20, 1999.
Reargument Denied June 29, 1999.

Defendant was convicted in the Court of Common Pleas, Delaware County, Criminal Division, No. 26-96, Jenkins, J., as guilty, but mentally ill, on charges of third-degree murder and simple assault. Defendant appealed. The Commonwealth Court, No. 4505 Philadelphia 1997, Brosky, J., held that: (1) psychiatrist-patient privilege did not preclude psychiatrist from testifying for state, despite his presence at conference with other psychiatrists and defendant's attorney; (2) attorney-client privilege did not apply to the conference; (3) statute allowing verdict of "not guilty by reason of insanity" does not violate the equal protection and due process clauses by requiring the defendant to prove insanity; (4) evidence of defendant's drug use and other bad acts was admissible; (5) admitting hearsay statements relied on by psychiatrists did not violate confrontation clause; (6) prosecutor's closing argument that edited version of videotape shown by defendant omitted evidence unfavorable to him was permissible; (7) defendant was not entitled to an instruction that a hung jury was a possible outcome; and (8) hearsay statement in police chief's letter could be considered at sentencing.

Affirmed.

Vincent J. Grogan, Pittsburgh, for appellant.

Alan Dershowitz, Cambridge, MA, for appellant, pro hac vice.

Laurie Magid, Asst. Dist. Atty., Media, for Com., appellee.

Before KELLY, LALLY-GREEN and BROSKY, JJ.

BROSKY, J.

¶ 1 John E. duPont appeals from judgment of sentence imposed after a jury found him guilty, but mentally ill, of third degree murder [FN1] and simple assault. [FN2] For the reasons which follow, we affirm the judgment of sentence.

> FN1. Third degree murder is set forth at 18 Pa.C.S. § 2502(c); provision for a finding of Guilty but mentally ill is set forth at 18 Pa.C.S. § 314.
>
> FN2. 18 Pa.C.S. § 2701.

¶ 2 Prior to his arrest in January 1996, appellant resided on an 800-acre estate known as "Foxcatcher Farm" located in Delaware County. For many years appellant operated a wrestling training facility on the premises, and provided housing on the estate to some of the wrestlers who trained at his facility and were members of "Team Foxcatcher," a wrestling team founded by appellant.

¶ 3 People who knew appellant noticed a change in his behavior and emotional state around the time of his mother's death in 1988. Appellant became extremely security conscious, and hired a security firm in 1993 to provide protection on the estate. Despite the firm's efforts implementing extensive security measures, appellant exhibited paranoid fear on several occasions that he was being spied upon and that his life was in danger. [FN3] Several witnesses

also related incidents of appellant's drug and alcohol abuse between 1988 and 1995. In spite of his unusual behavior, however, appellant continued to manage his facility and maintain the daily operations.

> FN3. During 1993, for example, appellant installed razor wire in the walls of his home to prevent persons from hiding within the walls; he also had excavators dig on his property to search for underground tunnels he believed to lead to his home.

¶ 4 Over time appellant developed close relationships with some of the wrestlers at his facility, and came to dislike others. He began to exhibit animosity toward David Schultz, a successful wrestler and also one of the facility's wrestling coaches, sometime in 1995. On the afternoon of January 26, 1996, appellant went to the residence of Mr. Schultz accompanied by one of the estate security consultants, Patrick Goodale. Mr. Schultz was working on his car, but greeted appellant on his arrival. Appellant asked Mr. Schultz, "You got a problem with me?" and shot him three times with a .44 Magnum revolver. He also pointed the weapon at Mr. Goodale and toward Mr. Schultz' wife who was in the house. Appellant then fled in his vehicle to his mansion, reloaded and locked up his weapon, and refused to surrender to police. During the two day standoff which followed, appellant spoke with his attorney on numerous occasions. He was finally apprehended on January 28, 1996 when he left the mansion to attempt a repair of the heating system.

¶ 5 On February 9, 1996 the trial court ordered a competency examination, which was completed on September 9, 1996. [FN4] Following a hearing on appellant's competency, the trial court determined appellant to be incompetent to proceed to trial [FN5] by order of September 24, 1996. He was remanded to the Norristown State Hospital for treatment. A second competency hearing was held in December 1996, and the trial

court determined that appellant was then competent to proceed to trial, which began in January 1997.

> FN4. In the interim, our Supreme Court had entered a stay of all competency proceedings, which was removed on August 19, 1996.
>
> FN5. 50 P.S. §§ 7101 et seq.

¶ 6 At trial, appellant did not dispute that he shot Mr. Schultz, but put forth a defense of insanity. Following the guilty but mentally ill verdicts, he was sentenced on May 13, 1997 to a term of imprisonment of thirteen to thirty years on the murder conviction and a concurrent term of three to six months on the assault conviction; an order for costs was also imposed. Post trial motions were denied by the trial court on October 17, 1997 and this appeal followed.

¶ 7 Appellant raises the following issues for our review:

I. The trial court erred in permitting the Commonwealth's psychiatric expert to testify in violation of both the psychiatrist-client and attorney- client privileges, where the witness previously was consulted about duPont's mental condition;

II. Pennsylvania's statutory framework for not guilty by reason of insanity and guilty but mentally ill determinations was not followed in this case; those laws - as they were applied - violate the due process, equal protection, and cruel and unusual punishment provisions of the constitution;

III. The trial court erred in allowing the Commonwealth to admit evidence of duPont's alleged prior bad acts;

IV. duPont is entitled to a new trial because hearsay was admitted in violation of the expert testimony rule and

duPont's constitutional right of confrontation;

V. The court below erred in permitting the prosecutor to argue that the jury could draw an inference against the defendant because the defense had presented only portions of a videotaped interview and in instructing the jury that such an inference would be proper;

VI. duPont was prejudiced by the use of a misleading verdict sheet containing written jury instructions;

VII. The sentence should be vacated as unreasonable and because the bill of costs is excessive.

I. The Commonwealth's Psychiatric Expert Witness

¶ 8 We first address appellant's contention that the trial court erred in permitting the Commonwealth to present testimony of Dr. John O'Brien as a psychiatric expert on appellant's mental condition. The trial court had originally appointed Dr. O'Brien in March 1996 as one of two physicians to examine appellant in connection with his competency to stand trial. Defense counsel objected to his appointment but the reasons therefor do not appear on the record. The trial court did, however, vacate Dr. O'Brien's appointment based on the objection, and replaced him with a different doctor.

¶ 9 At the September 1996 competency hearing, Dr. O'Brien was called to testify as an expert witness for the Commonwealth. The defense again objected and made an oral motion to disqualify him as a witness, this time referring to some past relationship between Dr. O'Brien and appellant. The trial court heard argument by counsel, summarized on the record the limited previous connection between Dr. O'Brien and appellant, [FN6] and denied the motion to disqualify. As stated above, the trial court found appellant was not competent in September 1996 to proceed to trial, but after treatment the

court did determine he was competent in a subsequent hearing in December 1996.

> FN6. The trial court stated that Dr. O'Brien had contacted the court when his appointment was vacated, in an effort to explain his limited prior connection to appellant and to assure the court that he did not intend to conceal this information. The court summarized this contact as follows:
> THE COURT: [Dr. O'Brien] never opened a file on Mr. duPont. He had never met Mr. duPont, that his only information regarding Mr. duPont was obtained by him when certain individuals consulted a physician at the institute regarding Mr. duPont and his behaviors, and that physician, in turn called in a number of other physicians to the conference, essentially to solicit their opinion. And Dr. O'Brien voiced certain opinions with regard to the reports of the conduct that he had received and what could or could not be done legally as a result of that conduct and left the room.
> Is that a correct statement of the limit of Dr. O'Brien's contact with Mr. duPont?
> MR. WOCHOK [Counsel for defendant]: Except for the fact I believe he also signed onto the report that was prepared as a result of that meeting and was, in fact, paid by me when he submitted his bill.
> N.T. 9/21/96, pp. 675-76.

¶ 10 In his defense, appellant presented extensive evidence that he suffered from mental illness, specifically paranoid schizophrenia. This evidence included his delusional beliefs, particularly during the standoff and in examinations after the shooting, that he was Jesus Christ, the Dalai Lama, and a Russian czar, among others. Appellant's expert witnesses opined that he was insane at the time he shot Mr. Schultz.

¶ 11 On rebuttal, the Commonwealth called Dr. O'Brien to testify as one of their expert psychiatric witnesses, and the trial court reiterated on the record that the defense motion to disqualify him from testifying was denied. No written form of this motion nor any accompanying supporting documents were ever filed of record. [FN7] Dr. O'Brien testified that, in his opinion, appellant did suffer from mental illness but was not insane at the time Mr. Schultz was shot. The Commonwealth's other expert, Dr. Park Dietz, provided a similar opinion.

> FN7. Appellant has included a copy of a Motion to Disqualify Dr. O'Brien in his Reproduced Record. However, the law is clear that this court may only review and consider matters which have been filed as part of the certified record. Commonwealth v. Gonzalez, 415 Pa.Super. 65, 608 A.2d 528 (1992); Pa.R.A.P.1921. Nevertheless, there is sufficient evidence of record to enable us to address the merits of this argument.

¶ 12 Appellant contends on appeal that the trial court erred when it permitted the Commonwealth to present Dr. O'Brien's testimony in light of his previous connection to appellant. He argues that both the psychiatrist- patient privilege, 42 Pa.C.S. § 5944, and the attorney-client privilege, 42 Pa.C.S. § 5916, have been violated by admission of this testimony.

¶ 13 Dr. O'Brien testified that four years earlier, in December 1992, he had attended a conference with two other psychiatrists and Mr. Wochok, an attorney for appellant. Dr. O'Brien, who was often involved with involuntary civil commitment of persons, was present at the request of one of the other physicians. The conference lasted approximately one hour, and Dr. O'Brien recalled only that they discussed possible means of obtaining a psychiatric evaluation of Mr. duPont, that duPont probably used cocaine, and that duPont had once fired

a weapon inside his home.

¶ 14 Dr. O'Brien never met, spoke with, or saw Mr. duPont, did no evaluation or treatment of him, and did not even know appellant was the same duPont who had been the subject of the 1992 conference until trial counsel raised the question. Dr. O'Brien had no memory of specific communications made during the course of the conference, nor had any other independent recollection of the meeting.

¶ 15 The psychiatrist-client privilege as set forth in § 5944 provides in relevant part as follows.

> No psychiatrist ... shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychiatrist and his client shall be on the same basis as those provided or prescribed by law between attorney and client.

42 Pa.C.S. § 5944 (emphasis added). In Commonwealth v. Fewell, 439 Pa.Super. 541, 654 A.2d 1109 (1995), this court stated:

> The privilege afforded by § 5944 was intended to inspire confidence in the client and to encourage full disclosure to the psychologist [and psychiatrist]. By preventing the latter from making public any information which would result in humiliation, embarrassment or disgrace to the client, the privilege is designed to promote effective treatment and to insulate the client's private thoughts from public disclosure.

654 A.2d at 1112-13 (quoting Commonwealth v. Kyle, 367 Pa.Super. 484, 533 A.2d 120, 129 (1987), appeal denied, 518 Pa. 617, 541 A.2d 744 (1988)).

¶ 16 The privilege is clearly designed for protection of confidential communications from a client to his physician. Commonwealth v. Simmons, 719 A.2d 336 (Pa.Super.1998). It is the preservation of the confidential relationship which is sought to be protected. Fewell, supra. In this case, appellant was never a client or patient of Dr. O'Brien. In 1992, there was no confidential relationship between appellant and Dr. O'Brien, nor an exchange of any communications, which would be protected by the psychiatrist- patient privilege and require preclusion of Dr. O'Brien's testimony.

¶ 17 Appellant also contends that the attorney-client privilege as provided by § 5916 should also have operated as a bar to the testimony. That section provides:

> In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S. § 5916.

¶ 18 Appellant argues Dr. O'Brien used information obtained from that 1992 conference, particularly that duPont had been abusing alcohol and using cocaine, in formulating his expert opinion given at trial. This, he contends, is an impermissible violation of the attorney-client privilege. It is true that the attorney-client privilege does extend to an agent of an attorney who assists in the provision of legal advice to the client. Commonwealth v. Noll, 443 Pa.Super. 602, 662 A.2d 1123 (1995), appeal denied, 543 Pa. 726, 673 A.2d 333 (1996). Certainly attorneys today often consult with and rely upon the advice of other professionals to assist them in providing legal services. However, application of the privilege requires confidential communications made in connection with providing legal services. Commonwealth v. Boggs, 695 A.2d

839 (Pa.Super.1997), appeal denied, 553 Pa. 686, 717 A.2d 1026 (1998). The record does not support appellant's contention that the privilege was violated in this case. There is no evidence that confidential attorney-client communications were divulged in the December 1992 meeting. From the record one can only conclude that appellant's attorney consulted with several psychiatrists four years prior to the shooting, in an effort to determine how best to obtain an evaluation of appellant's mental health, and was completely unrelated to any provision of legal services. In addition, there is no evidence of record to establish any attorney-client relationship between defense counsel and Dr. O'Brien with respect to the present case.

¶ 19 This is not a situation where a consultation was sought by defense counsel to explore an insanity defense at trial. See, U.S. v. Alvarez, 519 F.2d 1036 (3 rd Cir.1975). Nor does the record establish that Dr. O'Brien received, retained or used any information from the conference. Dr. O'Brien testified that he had no recall of that meeting. His testimony at trial included detailed explanation of the sources of information he used at arriving at his diagnosis of appellant, which sources are specifically set forth in Commonwealth Exhibit 40, and include numerous psychiatric and police investigation reports as well as interviews of over thirty individuals familiar with appellant. There was testimony by several witnesses at trial that appellant abused alcohol and cocaine between 1988 and 1995, and expert witnesses for both sides were questioned on the effect of drug use on appellant's mental health. The record simply does not support the conclusion that the attorney-client privilege was violated in any way by the admission of Dr. O'Brien's testimony. [FN8] Finding no violation of either the psychiatrist-patient or attorney-client privilege, we thus conclude that the trial court did not err when it permitted the Commonwealth to present Dr. O'Brien's testimony as an expert psychiatric witness at appellant's trial.

FN8. We also note that the Commonwealth has been permitted to present rebuttal testimony of an expert psychiatric witness who was originally retained by the defense in preparation for trial, but whose opinion was favorable to the Commonwealth on the issue of sanity. See Commonwealth v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996). Appellant's previous contact with Dr. O'Brien is clearly much more limited than that of a defendant seeking evaluation for purposes of preparation of an insanity defense at trial.

II. Constitutionality of the "Guilty but Mentally Ill" Statute

¶ 20 Next appellant challenges the constitutionality of the application of the Pennsylvania statutes relating to "Guilty but mentally ill" and "Not guilty by reason of insanity." Those provisions, in relevant part, are as follows.

§ 314. Guilty but mentally ill

(a) General rule.--A person who timely offers a defense of insanity in accordance with the Rules or Criminal Procedure may be found "guilty but mentally ill" at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

(c) Definitions. ...

(1) "Mentally ill." One who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

(2) "Legal insanity." At the time of the commission of the act, the defendant was laboring under such a defect of reason,

from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.

18 Pa.C.S. § 314.

§ 315. Insanity

(a) General rule.--The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense.

(b) Definition.--For purposes of this section, the phrase "legally insane" means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.

18 Pa.C.S. § 315.

¶ 21 Appellant contends there is a conflict between these two provisions. In his interpretation, the Commonwealth must prove beyond a reasonable doubt that the actor was not legally insane pursuant to § 314, but the defense bears the burden to show by a preponderance of the evidence that he was legally insane pursuant to § 315. He concludes that the constitutional guarantees of due process and equal protection are violated by the application of the contradictory statutes. In support of this argument, appellant asks this court to conclude that the decision of Commonwealth v. Trill, 374 Pa.Super. 549, 543 A.2d 1106 (1988), appeal denied, 522 Pa. 603, 562 A.2d 826 (1989) was wrongly decided, and to seek guidance from the interpretations of courts in other jurisdictions of their own

statutes relating to insanity and mental illness.

¶ 22 We first point out that this Commonwealth has been consistent in its application of the M'Naghten rule since Commonwealth v. Mosler, 4 Pa. 264 (1846). [FN9] Commonwealth v. Reilly, 519 Pa. 550, 549 A.2d 503 (1988). We also note that our Supreme Court addressed the issue of the burden of proof required by the language of Sections 314 and 315 in Commonwealth v. Sohmer, 519 Pa. 200, 546 A.2d 601 (1988). There, the Court recognized that a defendant's sanity is presumed; that the burden of establishing insanity, by a preponderance of the evidence, is on the defendant; and further, that neither the defendant nor the Commonwealth had the burden of establishing mental illness, because that was a factual determination to be made from the evidence as a whole. Sohmer did not address the constitutionality of the statutes, however.

> FN9. Regina v. M'Naghten, 10 Cl. & Fin. 200, 9 Eng. Rep. 718 (1843). This rule, first applied in Pennsylvania in Mosler, supra, is codified in § 315 of the Crimes Code. See also, Commonwealth v. Banks, 513 Pa. 318, 521 A.2d 1 (1987); Commonwealth v. Hicks, 483 Pa. 305, 396 A.2d 1183 (1979); Trill, supra.

¶ 23 Legislation enacted by the General Assembly carries a strong presumption of constitutionality, and the party challenging the constitutionality of any statute bears a heavy burden of demonstrating that the statute is clearly, palpably and plainly unconstitutional. Commonwealth v. Burnsworth, 543 Pa. 18, 669 A.2d 883 (1995). Appellant contends that application of Section 314 is unconstitutional. His argument is that the Commonwealth should bear the burden of proving, beyond a reasonable doubt, that a defendant did not satisfy the M'Naghten test. In other words, appellant believes that when an insanity defense is proffered, constitutionally the burden

should be on the Commonwealth to prove, beyond a reasonable doubt, that the defendant was not insane and knew that what he was doing was wrong.

¶ 24 In Trill, supra, a panel of this court conducted an extensive review of §§ 314 and 315, and specifically rejected the argument that § 314 was unconstitutional. The court explained that the legislature had recognized two classifications of persons in those sections: the person who is "sick and bad", or guilty but mentally ill, and the person who is "sick" or insane. It went on to explain that in applying the two sections, several sequential steps of inquiry must be made by the fact finder. First, a determination is made as to whether the Commonwealth has proven the defendant's guilt of every element charged beyond a reasonable doubt. Second, a determination must be made as to whether the defendant has proven insanity by a preponderance of the evidence. If so, the defendant is acquitted. If not, the third step requires a determination of whether the facts establish beyond a reasonable doubt that the defendant is mentally ill. In addressing the equal protection and due process arguments, the panel concluded as follows.

> Our legislature settled upon what they believed to be the most comprehensive legal definitions available to describe the terms "mentally ill" and "legal insanity" and incorporated them into Pennsylvania's guilty but mentally ill statutory scheme. The definition of "legal insanity" derived from the well-engrained common-law M'Naghten standard for insanity, whereas the definition of "mentally ill" emanated from the American Law Institute's insanity standard. See ALI Model Penal Code § 4.01(1) (Proposed Official Draft 1962). By transposing the ALI definition into one for mental illness, the legislature accomplished what they believed to be a logical corollary to the M'Naghten rule. We will not second-guess the rectitude of this choice.

543 A.2d at 1129. See also, Commonwealth v. Zewe, 444 Pa.Super. 17, 663 A.2d 195 (1995), appeal denied, 544 Pa. 629, 675 A.2d 1248 (1996)(Pennsylvania's "guilty but mentally ill" statute does not violate due process or equal protection); Commonwealth v. Eck, 439 Pa.Super. 530, 654 A.2d 1104 (1995)(rejecting appellant's invitation to adopt the Model Penal Code definition of "insanity", which is the same as Pennsylvania's "guilty but mentally ill" definition; and recognizing that the constitutionality of § 314 has repeatedly been upheld); see also, Rock v. Zimmerman, 959 F.2d 1237 (3 rd Cir.1992), cert. denied, 505 U.S. 1222, 112 S.Ct. 3036, 120 L.Ed.2d 905 (1992)(recognizing that Pennsylvania follows the "classic" M'Naghten test for insanity). Were this a case of first impression in this Commonwealth, we might lend more credence to appellant's constitutional arguments. However, we are not persuaded that this court should decline to follow the precedents established in Trill and Sohmer. The allocation of the burden of proof where insanity is a defense has been clearly defined, and challenges to the constitutionality of the relevant statutes have previously been rejected. We therefore conclude there is no merit to appellant's argument that the application of Sections 314 and 315 was unconstitutional.

¶ 25 Appellant also argues that the distinction between the definitions of mental illness and insanity are slight, that a person could satisfy both definitions, and that a jury is therefore required to choose between one or the other. He contends this flaw is further compounded by the instructions given to the jury which permitted it to select either a verdict of "insane" or "guilty but mentally ill." However, appellant misapprehends the step-by-step analysis set forth in Trill and Sohmer, and given by the trial court to the jury in its instructions, as well as by the progression of questions on the verdict slip.

¶ 26 The trial court charged the jury on "guilty but mentally ill" and "legal insanity" using Pennsylvania Suggested

Standard Jury Instruction (Criminal) 5.01A(1). This instruction has been specifically approved by this court, and correctly sets forth the present state of the law in the Commonwealth. Commonwealth v. Bowers, 400 Pa.Super. 377, 583 A.2d 1165 (1990), appeal denied, 528 Pa. 627, 598 A.2d 281 (1991); Trill, supra. The jury was required to determine first whether the Commonwealth had proven each element of the crimes charged beyond a reasonable doubt. Next the jury was instructed to determine whether appellant established that he was legally insane at the time of the shooting. Finally, and only if a finding of insanity was not made, the jury was to decide whether appellant was guilty but mentally ill based upon the evidence. We find no error in the instructions given by the trial court which are consistent with the law of this Commonwealth.

¶ 27 Finally with respect to the mental illness issue, appellant contends that he has been subjected to cruel and unusual punishment based on the verdict, because he has been imprisoned as a result of his mental illness. Appellant reiterates that he could be considered "insane" under the ALI definition of insanity as well as under statutes of other jurisdictions. As previously stated, appellant was found guilty but mentally ill based on application of Pennsylvania law. The jury did not determine him to be legally insane. There is no prohibition in the Constitution against punishment simply because the law in other jurisdictions differs and might yield another penalty. This argument is also without merit.

III. Evidence of Prior Bad Acts

¶ 28 We next turn to appellant's contention that the trial court erred when it admitted evidence of prior bad acts. Evidence of other crimes or prior bad acts is generally inadmissible except "in certain circumstances where the evidence is relevant for some other legitimate purpose and not merely to prejudice the defendant by showing him to be a person of bad character."

Commonwealth v. Lark, 518 Pa. 290, 302, 543 A.2d 491, 497 (1988). These special circumstances permit the introduction of such evidence where the probative value of the evidence outweighs the prejudice against the defendant.

> [E]vidence of other crimes [may] be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial[.]

Id., quoting Commonwealth v. Morris, 493 Pa. 164, 175, 425 A.2d 715, 720 (1981). Such evidence is also admissible when it is part of the sequence of events forming the history of the case as a part of the natural development of the facts. Commonwealth v. Thomas, 552 Pa. 621, 717 A.2d 468 (1998). These evidentiary issues are within the sound discretion of the trial court. Commonwealth v. Banks, 513 Pa. 318, 521 A.2d 1 (1987), cert. denied, 484 U.S. 873, 108 S.Ct. 211, 98 L.Ed.2d 162 (1987).

¶ 29 Appellant first argues that the Commonwealth's evidence relating to his prior drug use was improperly admitted. However, a review of the record reveals that it was appellant's experts who first introduced the subject. As the trial court noted, it was a defense expert who made the first references to appellant's drug use, when he opined on direct examination that appellant's mental illness was not the result of substance abuse. Several other defense witnesses, both lay and expert, made detailed reference in their testimony to appellant's use of cocaine and alcohol. The cause of appellant's mental illness was clearly crucial to the defense, and consideration of his substance abuse, particularly by his expert witnesses, was an indispensable facet of establishing the history of that mental illness. Testimony by Commonwealth witnesses related to

appellant's drug use was not presented until after the defense rested, and was offered specifically to rebut appellant's evidence that his mental illness was not a cocaine-induced psychosis.

¶ 30 In addition, appellant's arguments that the evidence of cocaine use was too remote in time must also fail. His experts testified at length as to a change in his demeanor and behavior beginning with his mother's death in 1988 and continuing beyond the shooting. This testimony reflected the defense position that appellant had a history a mental illness. Evidence of any behavior during that time period which reflected appellant's mental state, including substance abuse, was clearly relevant, and the weight to be afforded the evidence was a question for the jury. We find no error.

¶ 31 Next appellant challenges the admission of testimony that appellant had allegedly admitted to being involved in a hit and run accident in December 1987. This evidence, admitted over defense objection, was offered to illustrate appellant's state of mind and ability to appreciate the nature and quality of his acts during a crucial time period in this case, and was not merely evidence of a prior bad act. According to the defense, appellant was already exhibiting signs of mental illness at least by 1988, very near in time to the alleged accident. Certainly this evidence was probative as part of the natural history of this case, particularly appellant's history of mental illness. We conclude the trial court did not abuse its discretion when this relatively brief testimony was introduced. Thomas, supra.

¶ 32 We also reject appellant's further contentions that he was prejudiced by evidence of the following other "bad acts". [FN10] Testimony by Mrs. Schultz that appellant sometimes was speeding in his automobile near her home was relevant to the deterioration of the relationship between the Schultzes and appellant, and was probative of appellant's behavior during late 1995. Testimony of Dr. Dietz, one of the Commonwealth

experts, that Mr. Schultz and others were concerned in November 1995 about appellant's decisions to remove several African-American wrestlers from the team, was also probative and relevant to appellant's behavior in late 1995. The other specified bad acts [FN11] were also limited to brief testimony, and also offered for legitimate purposes: specifically, appellant's behavior during the critical time period of 1993-1996. The probative value of the prior bad acts now challenged by appellant was not outweighed by any prejudicial effect. In addition, we note that the trial court gave detailed, appropriate cautionary instructions to the jury that the evidence of prior bad acts or bad behavior was limited in its application. Commonwealth v. Claypool, 508 Pa. 198, 495 A.2d 176 (1985). We find no prejudice to appellant, nor abuse of the trial court's discretion.

FN10. We note that appellant agrees with the Commonwealth's contention that appellant's defense counsel did not object to each and every instance of "bad acts" testimony which he now challenges on appeal. Appellant argues continuous objections would have been futile. In an abundance of caution, we address these instances of prior bad acts evidence on the merits.

FN11. A witness was questioned whether appellant threw firecrackers at a pack of llamas on his estate; another witness stated appellant flew a flag of his own above the American flag; another witness stated appellant fired a wrestler; another witness testified appellant did not indicate any religious preference when he filled out a form.
A defense witness was questioned on direct examination about appellant's interest in the Third Reich and spoke of appellant's Nazi memorabilia. Clearly evidence of bad acts which was profferred by appellant presumably in support of his insanity defense

cannot now be considered objectionable.

IV. Admission of Hearsay Evidence and the Confrontation Clause

¶ 33 Appellant next argues the trial court erred when it admitted hearsay evidence by the Commonwealth's two psychiatric experts, Dr. O'Brien and Dr. Dietz, over objection of defense counsel. Specifically, appellant challenges testimony by these witnesses as to certain out of court statements made by Georgia Dusckas, an employee of appellant, as to her observations of appellant's actions and demeanor prior to and on the day of the shooting, as well as her general familiarity with appellant's deteriorating relationship with Mr. Schultz. [FN12] Ms. Dusckas was not called to testify at trial by either the Commonwealth or the defense.

FN12. Appellant states in his brief that Ms. Dusckas' statement is over 200 pages in length, yet the Commonwealth's witnesses referred only to several isolated portions of her statement. He specifically points out testimony regarding "her own perceptions about duPont's temper; his delusional statements; his relationship with Schultz; and his actions on returning to the mansion ... a perspiration soaked T-shirt discarded after the shooting; the lack of delusional statements on the day of the incident; and the timing of events on the day of the shooting." (Appellant's Definitive Brief at 51-52)(references to Reproduced Record omitted). Appellant also states that "Dietz also improperly referenced statements of Kenny Munday, who did not testify at trial." This reference was to a November 1995 statement of Mr. Munday relating to appellant's having removed several African American athletes from the team. This reference was discussed supra at pp. 981-82.

¶ 34 Appellant acknowledges that experts are generally permitted to rely on out of court statements in forming their opinions; however, he contends that Drs. O'Brien and Dietz did not rely on Ms. Dusckas' statements prior to reaching their respective opinions. Rather, he argues, the witnesses were permitted to use her statements merely to corroborate their own testimony, and the jury had no means of assessing the reliability of the limited portions of her statement referred to by the doctors. Further, appellant contends his right of confrontation has been violated because there was no showing that Ms. Dusckas was unavailable, nor was there reliable indication of trustworthiness of these statements. The result, he concludes, is that the admission of these statements directly impacted the jury's finding that appellant was not insane at the time of the shooting.

¶ 35 It is well established law in the Commonwealth that a medical expert is permitted to rely on reports of other persons which do not appear of record in forming his opinion, provided such matters are customarily relied upon in the practice of his profession. Commonwealth v. Elliott, 549 Pa. 132, 700 A.2d 1243 (1997); Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971). The record is clear that the medical experts presented by both the Commonwealth and defense relied extensively on reports of numerous other persons, many of which were not part of the evidence presented at trial. Moreover, appellant's assertions that Drs. O'Brien and Dietz did not consider Ms. Dusckas' statement in formulating their expert opinions are belied by the record. Both doctors specifically referred to the statements of Ms. Dusckas as information on which they relied in arriving at their respective conclusions at trial regarding appellant's mental state on the day of the shooting.

¶ 36 In addition, appellant's argument that his right of confrontation has been violated by testimony regarding Ms.

Dusckas' statements is likewise without merit. The cases on which appellant relies simply do not support his contention that portions of her out of court statements were improperly admitted because she was not unavailable, she was not subject to cross-examination, and no indicia of the reliability of the statements existed.

¶ 37 There is no requirement in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), in a Confrontation Clause analysis, that a declarant be unavailable, unless the challenged statements were made during a prior court proceeding. White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992); United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). The underlying purpose of the Confrontation Clause is promotion of the "integrity of the fact-finding process." White, supra, at 356-57, 112 S.Ct. 736 (citations omitted). In a case where there is substantial compliance with the purpose of the Confrontation Clause, actual confrontation of the declarant is not required. See, e.g., Roberts, supra. "[W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." White, supra, at 356, 112 S.Ct. 736. As a panel of this court recognized in Primavera v. Celotex Corp., 415 Pa.Super. 41, 608 A.2d 515 (1992), appeal denied, 533 Pa. 641, 622 A.2d 1374 (1993), "The fact that experts reasonably and regularly rely on [out of court] information merely to practice their profession lends strong indicia of reliability to source material, when it is presented through a qualified expert's eyes." 608 A.2d at 520. That is not to say that an expert may simply transmit hearsay statements, of course; the intent is to permit an expert to rely on sources of information used in the ordinary practice of the profession, and to disclose those sources to the jury. Id. Both Dr. O'Brien and Dr. Dietz, as well as the numerous other medical experts, testified as to the sources they reviewed and considered in formulating their opinions, including the statements of Ms. Dusckas. In light of

the foregoing, we conclude the trial court's admission of these statements was not error.

V. Argument of the Prosecution

¶ 38 Appellant next contends the trial court erred when it permitted the prosecutor to argue that an adverse inference could be drawn by the defense's failure to present an entire videotaped interview rather than an edited portion, and then further compounded the error by instructing the jury that such an inference was a permissible one. During the testimony of Dr. Resnick, a defense expert, he explained that he had edited a videotaped interview he conducted of appellant and showed the edited portion to the jury to illustrate his testimony. No other portion of the videotape was played by either the Commonwealth or the defense. During closing argument the Commonwealth stated the following.

> You saw the Defendant on tape but you didn't see the whole tape. You saw an edited tape .... The reason you didn't see the whole tape was because in some of the other tapes [sic] are where he's most clearly pressed and asked to address the issue of, well, "You got a problem with me?" and "Were you afraid of Dave Schultz?" He denies that. Were you ever afraid of him? Do you know it's wrong to kill a human being? He agrees to that. And well, can you imagine never having anger at David Schultz? I'm not going to talk about that. I'm not going to talk about that.

N.T. 2/18/97, p. 3096. Defense counsel objected at sidebar, and requested that the court instruct the jury that it should not consider evidence which was not before them. The trial court denied this request, but granted the defense's alternative request, that the jury be instructed that the entire tape was available to both sides. The relevant portion of the charge is as follows:

Finally, once again, ladies and gentlemen, the speeches of counsel are not part of the evidence and you should not consider them as such.

However, in deciding the case you should carefully consider the evidence in light of the various reasons and arguments that have been presented by each attorney.--

I've stated earlier, ladies and gentlemen, that counsel make references to both facts and to inferences that they feel may be logically drawn from the facts.

For instance, the Commonwealth's counsel stated in closing that the portion of the videotape used by Dr. Resnick that was edited out, that you did not see, was less favorable to the defendant than the portion which was viewed.

This is, of course, an inference that the Commonwealth's attorney has drawn and is suggesting to you that you are not bound by that inference [sic]. You may either accept it or reject it, keeping in mind that the entire tape was available to both parties in the case.

N.T. 2/18/97, p. 3128.

¶ 39 It is well established that a prosecutor is permitted to vigorously argue his case, as long as the comments made are supported by evidence and any inferences may be reasonably derived from the evidence. Commonwealth v. LaCava, 542 Pa. 160, 666 A.2d 221 (1995). The remarks must be examined in the context in which they were made, and will not be deemed improper if they simply constitute oratorical flair. Commonwealth v. Hall, 549 Pa. 269, 701 A.2d 190 (1997), cert. denied, 523 U.S. 1082, 118 S.Ct. 1534, 140 L.Ed.2d 684 (1998).

¶ 40 In this case, the remarks by the prosecution relating to the

unshown portions of the videotape were directly based on evidence of record. The jury was aware before the videotape was shown that it was an edited version, and that the Commonwealth had possession of the entire tape. On cross-examination, both Dr. Resnick and Dr. Sadoff were specifically questioned about appellant's comments on the edited portion of the tape, including his fear of Mr. Schultz and the statement, "You got a problem with me?" There was testimony by several witnesses, including Drs. Resnick and Sadoff, as to whether appellant knew it was wrong to kill a human being. Because the challenged portion of the prosecution's closing argument was based on evidence of record, it was not improper. Furthermore, the trial court's instructions to the jury were clear statements of well settled law in the Commonwealth. The cases cited by appellant to support his argument relate specifically to missing witness instructions, and have no application to this case. We therefore conclude this argument is without merit.

VI. The Verdict Slip

¶ 41 Next appellant contends he "was prejudiced by the use of a misleading verdict sheet containing written jury instructions." Appellant's Definitive Brief at 62. [FN13] Trial counsel did not object to the use of the verdict slip, and therefore this issue has been waived. Commonwealth v. Robinson, 543 Pa. 190, 670 A.2d 616 (1995). Moreover, we conclude that this argument has no merit.

> FN13. The full text of the Verdict Slip is as follows.
> 1. Do you find that the Defendant, John E. duPont, shot and killed David Schultz? Choose one answer on which you all agree. YES ___ NO ___.
> If your answer to Question # 1 is Yes, proceed to Question # 2. If your answer to Question # 1 is NO, proceed to Question # 6.
> 2. Do you find that the Defendant, John duPont is not

guilty because he was legally insane at the time he shot and killed David Schultz? Choose one answer on which you all agree. YES ___ NO ___

If your answer to Question # 2 is Yes, return to the Courtroom. Your job is finished. Do not answer any further questions. If your answer to Question # 2 is NO, proceed to Question # 3 below.

3. What is your verdict on the charge of criminal homicide by Murder in the First Degree? Choose one verdict on which you all agree.

NOT GUILTY ___ GUILTY ___ GUILTY BUT MENTALLY ILL ___

If you find the Defendant Not Guilty, proceed to Question # 4. However, if you find the Defendant either Guilty, or Guilty But Mentally Ill, do not answer any further questions relating to criminal homicide, and instead proceed directly to Question # 6.

4. What is your verdict on the charge of criminal homicide by Murder in the Third Degree? Choose one verdict on which you all agree.

NOT GUILTY ___ GUILTY ___ GUILTY BUT MENTALLY ILL ___

If you find the Defendant Not Guilty, proceed to Question # 5. However, if you find the Defendant either Guilty, or Guilty But Mentally Ill, do not answer any further questions relating to criminal homicide, and instead proceed directly to Question # 6.

5. What is your verdict on the charge of criminal homicide by Voluntary Manslaughter?

Choose one verdict on which you all agree.

NOT GUILTY ___ GUILTY ___ GUILTY BUT MENTALLY ILL ___

Proceed to Question # 6.

6. What is your verdict on the charge of Simple Assault on Patrick Goodale? Choose one verdict on which you all agree.

NOT GUILTY ___ GUILTY ___ GUILTY BUT

MENTALLY ILL ___
Proceed to Question # 7.
7. What is your verdict on the charge of Simple Assault on Nancy Schultz? Choose one verdict on which you all agree.
NOT GUILTY ___ GUILTY ___ GUILTY BUT MENTALLY ILL ___

¶ 42 Appellant argues on the one hand that the verdict slip contained improper written instructions to the jury, and also argues on the other hand that it failed to include a definition and an explanation of burden of proof. Our Supreme Court has held that the submission of written jury instructions to a jury for use during deliberations is unfairly prejudicial to a defendant and outweighs any possible benefit. Commonwealth v. Karaffa, 551 Pa. 173, 709 A.2d 887 (1998); Commonwealth v. Oleynik, 524 Pa. 41, 568 A.2d 1238 (1990). However, the cases cited by appellant are inapposite to the case sub judice, as each of those cases involved disapproval of a verdict slip containing definitions or other written notations referencing evidence produced at trial. [FN14] There were no definitions or other notations on the verdict slip in the present case which consisted simply of seven questions for the jury to answer pursuant to the trial court's oral instructions.

FN14. Commonwealth v. Todaro, 549 Pa. 545, 701 A.2d 1343 (1997)(written definitions of causation and the individual crimes with which defendant was charged); Oleynik, supra (written definitions of individual crimes charged); Commonwealth v. Kelly, 484 Pa. 527, 399 A.2d 1061 (1979)(written notations referring to evidence produced at trial); Commonwealth v. Byrd, 409 Pa.Super. 611, 598 A.2d 1011 (1991)(written definitions of crimes charged).

¶ 43 Appellant also argues the verdict was a "progression charge" which could have led the jurors to conclude that a

hung jury was not possible. This court has previously determined progression charges to be proper in homicide cases. Commonwealth v. Loach, 421 Pa.Super. 527, 618 A.2d 463 (1992), appeal denied, 535 Pa. 655, 634 A.2d 219 (1993); Commonwealth v. Hart, 388 Pa.Super. 484, 565 A.2d 1212 (1989), appeal denied, 525 Pa. 642, 581 A.2d 569 (1990). Moreover, appellant has cited no authority for the proposition that the jurors should have been informed that no verdict was a possible outcome in this case. The jury deliberated for seven days before reaching a verdict, and there is absolutely no indication that the jurors were coerced or misled into believing that the trial court in any way demanded that a verdict be reached. We conclude this argument is also devoid of merit.

VII. Discretionary Aspect of Sentence and Bill of Costs

¶ 44 Appellant next challenges the discretionary aspect of his sentence. [FN15] Immediately prior to sentencing, the trial court held a hearing to determine whether appellant was a severely mentally disabled individual in need of treatment, [FN16] and found that he was. The trial court sentenced him to a term of imprisonment of thirteen years to thirty years on the murder conviction, a concurrent term of three to six months on the simple assault conviction, and imposed the costs of prosecution in the sum of $742,107.20. Appellant contends that the sentence was unreasonable under the circumstances, and that the bill of costs imposed is excessive.

> FN15. Appellant failed to include in his original brief a concise statement of reasons relied upon with respect to the discretionary aspect of sentence as required by Pa.R.A.P. 2119(f) and Commonwealth v. Tuladziecki, 513 Pa. 508, 522 A.2d 17 (1987). This court granted his request to supplement his brief to include this statement by Order dated March 4, 1999.

> FN16. 42 Pa.C.S. § 9727.

¶ 45 Generally, the imposition of sentence is a matter vested within the sound discretion of the trial court. Commonwealth v. Smith, 543 Pa. 566, 673 A.2d 893 (1996). To constitute an abuse of discretion, the sentence must either exceed statutory limits or be manifestly excessive. Commonwealth v. Ellis, 700 A.2d 948 (Pa.Super.1997). In addition, review of the discretionary aspects of sentence is not automatic; we must first make a determination whether appellant has stated a substantial question that the sentence was not appropriate under the Sentencing Code to warrant our review. Id.

¶ 46 Appellant contends that the sentence was unreasonable because the trial court improperly considered his age and mental illness, a letter from the police chief who was neither a victim nor a family member, and the fact that the legislature in May 1995 had increased the sentence for third degree murder from ten to twenty years to twenty to forty years but the guidelines had not yet been revised accordingly. An allegation that the sentencing court gave improper consideration to certain factors generally does not raise a substantial question. Commonwealth v. Nixon, 718 A.2d 311 (Pa.Super.1998). In addition, an argument that the sentence is excessive when it falls within statutory limits also fails to raise a substantial question. Id. However, given the nature of this case, and in an abundance of caution, we shall address appellant's argument on the merits.

¶ 47 A person convicted of third degree murder may be sentenced to the statutory maximum penalty of forty years. 18 Pa.C.S. § 1103. Appellant's sentence was clearly within the statutory limit for the crime. The fact that the trial court acknowledged that the penalty for third degree murder had changed is of no consequence, particularly in light of her decision to apply the former guidelines as requested by the defense. We shall briefly address the factors which appellant contends the trial court considered improperly resulting in an

excessive sentence.

¶ 48 First, he objects to the court's consideration of a hearsay statement by reference to a sentence in a letter the trial court received from the chief of police of Newton Township where the crimes occurred. During the sentencing hearing, the trial court made reference to the one sentence as follows: "[T]he overwhelming opinion here is that we lost two friends the day of the killing and it remains in our minds as a very bad dream." [FN17] We note first that in sentencing, a court is not limited only to consideration of information which would be admissible evidence at trial. Commonwealth v. Charles, 339 Pa.Super. 284, 488 A.2d 1126 (1985); Commonwealth v. Knepp, 307 Pa.Super. 535, 453 A.2d 1016 (1982). In addition, the impact on the community is a relevant consideration in imposing a sentence. 42 Pa.C.S. § 9721. We find no abuse of discretion in the trial court's consideration of this one statement.

FN17. N.T., Sentencing Hearing, 5/13/97 at p. 318.

¶ 49 Next appellant contends the trial court did not properly consider his age and mental illness as mitigating factors. This assertion is clearly belied by the record made at the sentencing hearing, when the trial court specifically referenced appellant's age and mental illness as mitigating factors. In considering whether a sentence was manifestly excessive, we must give great weight to the discretion of the sentencing judge who was in the best position to measure various factors for consideration. Ellis, supra. The record made at the sentencing hearing clearly supports the conclusion that the trial court was aware of and considered all relevant factors in imposing an appropriate sentence. See, Commonwealth v. Cappellini, 456 Pa.Super. 498, 690 A.2d 1220 (1997). Her decision to depart from the former guidelines was not unreasonable and is well supported by this record. Nixon, supra.

¶ 50 Appellant also argues that the bill of costs taxed against him was excessive because it included the cost of a special assistant district attorney as well as several legal interns. Costs assessed against a criminal defendant include the expenses incurred by the district attorney in connection with the prosecution. 16 P.S. § 1403; Commonwealth v. Moran, 450 Pa.Super. 283, 675 A.2d 1269 (1996). The trial court conducted a hearing on the bill of costs submitted by the Commonwealth, which revealed that the district attorney's office had had two vacancies during the initial stages of prosecution of this case. In an effort to meet its obligations in this and all other cases in which it was required to prosecute, the district attorney's office engaged the services of a special prosecutor, and also assigned to legal interns the task of conducting various research projects related to this protracted prosecution. The trial court found that these costs were reasonable and necessary to meet the demands of this high profile, complex case. The voluminous record clearly supports this finding. We perceive no basis on which to conclude that the trial court's determination of necessary costs was erroneous.

¶ 51 For the foregoing reasons, and having determined that there is no merit to the issues raised in this appeal, the judgment of sentence must be affirmed.

¶ 52 Judgment of sentence affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

JOHN E. DuPONT,

Petitioner

No. 751M.D. Allocatur Docket 1999

Petition for Allowance of Appeal from the Superior Court

Motion for Admission Pro Hac Vice

ORDER

PER CURIAM:

AND NOW, this 13th day of January 2000, the motion for admission *pro hac vice* is granted and the petition for allowance of appeal is denied.

TRUE & CORRECT COPY

Attest: JAN 13, 2000

/s/
SHIRLEY J. PHIPPS
APPELLATE CLERK